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In The

Supreme Court of the United States

October Term, 1991

KAREN ENRIGHT, an infant under the age of 14 years old,
by her mother and natural guardian, PATRICIA ENRIGHT,

Petitioner,

PATRICIA ENRIGHT, Individually, and EARL ENRIGHT,
Individually,

Plaintiffs,

vs.

ELI LILLY & COMPANY, E.R. SQUIBB & SONS, INC.,
ABBOTT LABORATORIES, THE UPJOHN COMPANY,
MERCK & COMPANY, INC., and RXDC, INC., formerly
known as REXALL CORPORATION, formerly known as
REXALL DRUG COMPANY,

Respondents.

*On Petition for Writ of Certiorari to the Court of Appeals of
the State of New York*

**BRIEF FOR RESPONDENT
ELI LILLY AND COMPANY**

RUSSEL H. BEATIE, JR.

BROWN & WOOD

Attorneys for Respondent

Eli Lilly and Company

One World Trade Center

New York, New York 10048-0557

(212) 839-5300

CHARNA L. GERSTENHABER

CHARLES J. BIEDERMAN

Of Counsel



QUESTIONS PRESENTED

I. Did the petitioner's failure to raise a federal question in the New York courts until a motion for reargument after the final decision of the state's highest Court deprive this Court of jurisdiction?

II. Did the New York Court of Appeals' refusal to create a cause of action in strict liability for pre-conception torts violate petitioner Karen Enright's rights to equal protection and due process of law?

LIST OF SUBSIDIARIES PURSUANT TO RULE 29.1

CBI Uniforms, Inc.
Delta Holdings, Inc.
DowElanco
DowElanco B.V.
X.L. Limited
ACE Limited
BCR & Lilly Co., Ltd.
Japan Elanco Company Limited
Dong Yang Elanco Co., Ltd.
Daewoong Lilly Pharmaceutical Company, Ltd.
Eli Lilly-Gohar (Private) Limited
Lilly, S.A.
Dista, S.A.
Derly, S.A.
Elmedin, S.A.
Elanco Industrial, S.A.
Elancovet, S.A.
Elquiber, S.A.
Valquimica, S.A.
Geserco, S.A.
Hybritech, S.A.

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No. 91-243

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Respondents.

*On Petition for Writ of Certiorari to the Court of Appeals of
the State of New York*

BRIEF FOR RESPONDENT ELI LILLY AND COMPANY

Respondent Eli Lilly and Company ("Lilly") respectfully requests that this Court deny the Petition for a Writ of Certiorari brought by petitioner Karen Enright.

THE DECISION BELOW

In all three courts below, because the prescription drug which she claims her grandmother used and which she claims caused her injuries was DES, petitioner Karen Enright asked to be treated differently than others alleging a pre-conception tort. In a decision written by Sol Wachtler, Chief Judge of the Court of Appeals of the State of New York, New York's highest court, that court declined to give special treatment to a narrow class of third generation plaintiffs (those whose grandmothers had used diethylstilbestrol) and instead applied the general rule it had previously established in *Albala v. City of New York*, 54 N.Y. 2d 269, 445 N.Y.S. 2d 108, 429 N.E. 2d 786 (1981).

Albala was a medical malpractice case in which the plaintiff was conceived four years after an allegedly negligent act occurred. The New York Court of Appeals, in a decision also written by Chief Judge Wachtler, held that no negligence-based right of recovery existed for a pre-natal tort. A footnote in *Albala* noted that no cause of action for strict liability was presented in *Albala*, a negligence and malpractice case, and that application of the ruling to strict liability would, therefore, remain an open question. 54 N.Y. 2d at 274 n., 445 N.Y.S. 2d at 110 n., 429 N.E.2d at 788 n.

On the basis of *Albala*, the trial court in this case held that no tort cause of action in negligence, breach of warranty, fraudulent misrepresentation, or strict liability existed for a pre-conception tort. The intermediate appellate court reinstated the claim for strict liability.

On appeal, the New York Court of Appeals resolved the open question of strict liability. Petitioner openly asked the New York Court of Appeals to create a special class of plaintiffs entitled to recovery. The court refused and treated all plaintiffs alike. It stated that it adhered to the reasoning and result in *Albala* and declined to "expand liability beyond traditional bounds in the face of precedent from this court to the contrary. . . ." (Appendix to Petition "App." at 19b). The court noted that petitioner had not asked it

to remove some barrier to recovery that presents unique problems in DES cases, but to recognize a cause of action not available in other contexts simply (or at least largely) because this is a DES case. (App. at 9b).

The court recognized that petitioner here sought special treatment and concluded that *Albala* was no different from this case merely because it was a medical malpractice case:

The implication [of plaintiff's argument], of course, is that the public interest in providing a remedy for those injured by DES is stronger than the public interest in providing a remedy for those injured by other means — medical malpractice, for example. We do not believe that such a preference has been established. (App. at 11b).

Thus, in the decision below, the New York State Court of Appeals applied the same rule of law it had created nearly ten years earlier in *Albala* and held that:

[T]he distinctions between this case and *Albala* provide no basis for a departure from the rule that an injury to a mother which results in injuries to

a later-conceived child does not establish a cause of action in favor of the child against the original tort-feasor. For this reason, we decline to recognize a cause of action on behalf of plaintiff Karen Enright. (App. at 19b-20b).

After being rebuffed by the state courts in her effort to establish a favored sub-class of plaintiffs, petitioner reversed gears here and claimed, as a basis for federal review, that the refusal to create a favored sub-class had somehow created a disadvantaged sub-class. No such disadvantaged sub-class was created.

JURISDICTION

This Court does not have jurisdiction to review the decision of the New York State Court of Appeals because petitioner did not properly preserve any federal question in the proceedings below. At no step in the lengthy proceedings below was a federal issue raised by the plaintiffs before final judgment by the Court of Appeals. No court that reviewed petitioner's claim explicitly or implicitly considered any constitutional right to recovery.

The complaint was served in 1987. It did not raise any constitutional basis for petitioner's cause of action. It has no federal claim either as a separate cause of action or as an aspect of any cause of action.

In June 1988, defendants moved to dismiss petitioner's claims for failure to state a cause of action because New York law does not recognize pre-conception or third generation torts. In opposition to the motions and cross-motions, petitioner filed a 54-page Memorandum. It raised no federal constitutional argument. Neither did petitioner do so at oral argument.

In the decision granting defendants' motions and cross-motions for dismissal of petitioner's claim, Justice Irad Ingraham did not mention a federal constitutional issue. If petitioner was not aware of the need to address any federal constitutional rights at the time she served her complaint, Justice Ingraham's decision should have made it apparent.

Petitioner appealed Justice Ingraham's Order to an intermediate appellate court. Nowhere in her 38-page brief or at oral argument, did petitioner so much as imply that any federally-protected rights were implicated in this appeal.

That court reinstated the cause of action for strict liability. Again, however, nowhere in the decision did the court mention any federally-protected basis for a third generation DES plaintiff to maintain a cause of action.

The defendants moved for permission to appeal to the Court of Appeals. Petitioner opposed the motion, arguing that the decision was based on "some well-established legal precedents." She never mentioned any constitutional issue.

After permission to appeal was granted and defendants filed their papers, petitioner filed a 55-page brief which addressed numerous issues. Neither in her brief nor at oral argument did petitioner mention a constitutional basis for her claims.

New York's highest court reversed the decision of the intermediate court and reinstated the trial court's decision. Once again, no mention of any constitutional issue was made in the decision.

Only when she moved for reargument in the Court of Appeals did petitioner raise a constitutional argument. Petitioner also argued for the first time that the court had not considered a design

defect theory in reaching its decision. The constitutional argument was tacked on to the motion, the sole purpose apparently being to establish a basis for the current petition. Defendants opposed the motion primarily for petitioner's failure to raise those arguments below. The Court of Appeals denied petitioner's Motion for Reargument without opinion. Petitioner seeks review by this Court.

COUNTERSTATEMENT OF THE CASE

Diethylstilbestrol is the generic name for a synthetic, non-steroidal estrogen which was synthesized in 1937 and which duplicates the effects of natural estrogen in the human body. The drug has been before countless courts, both federal and state, on countless issues of state tort law, and has been offered to this Court for review on several occasions. This Court, however, has never granted *certiorari* in a case involving DES litigation. See, e.g., *Eli Lilly and Co. v. Hymowitz*, 110 S. Ct. 350 (1989); *Fleishman v. Eli Lilly and Co.*, 469 U.S. 1192, 105 S. Ct. 967 (1985); *E.R. Squibb & Sons v. Abel*, 469 U.S. 833, 105 S. Ct. 123 (1984); *E.R. Squibb & Sons, Inc. v. Collins*, 469 U.S. 826, 105 S. Ct. 107 (1984); *Abbott Laboratories v. Sindell*, 449 U.S. 912, 101 S. Ct. 286 (1980).

In this case, Rosemary Hickson used DES in 1959 and gave birth to her daughter Patricia in 1960. Patricia grew, married, became pregnant, and gave birth to Karen in 1981. Now, more than thirty years after the drug was used, Karen, the third generation plaintiff, seeks to hold Lilly liable for injuries to a person who not only had no contact with the drug but was not even conceived when it was used. This is not a case in which an ordinary product was bought by the grandmother, given to her daughter, and used by her granddaughter who was injured while using it. Here, the grandmother purchased, used, and consumed the product. The claim is brought on behalf of a third generation

person who was not born until more than two decades after the product was used.

In the courts below, petitioner complained that without special treatment, she would be left without a remedy. In making this argument, she conceded that, had a different drug been involved, she would not be entitled to relief and the intermediate appellate court accepted this distinction, saying "[t]he distinguishing factor is DES." (App. at 8c). Moreover, petitioner's brief to the New York Court of Appeals was replete with pleas for special treatment. For example, she sought "a *singular remedy* for a *singular situation*." (Brief at p. 30) (emphasis in original). Petitioner also quoted the intermediate appellate court's belief in "the Legislature's 'substantial flexibility in affording DES victims a remedy.' " (Brief at p. 24).

Now, on petition to this Court, petitioner reversed her claims for special favorable treatment and claims that she is being harmed by special unfavorable treatment. She alleges that she is being treated differently from other "DES victims." However, as the decisions below make clear, petitioner has been treated like every other pre-conception tort plaintiff in New York, DES or not, and has been denied recovery. The decision below raises no federal question and is not contrary to the Constitution of the United States of America.

REASONS FOR DENYING THE WRIT

I.

No federal question was properly preserved.

The first time petitioner ever raised a federal issue in this case was in her Motion for Reargument to the Court of Appeals, the highest court of the State of New York. Petitioner concedes

this in her petition (Petition at p. 11). In general, presentation of a federal question for the first time on reargument to the court of last resort of a state (the absolute last step before coming here) is insufficient. *Herndon v. Georgia*, 295 U.S. 441, 55 S. Ct. 794 (1935); *Bd. of Dir. of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 107 S. Ct. 1940 (1987).

Presentation of the federal claim for the first time upon appellate reargument is timely only:

if the ruling of the State court could not have been anticipated and a petition for rehearing presented the first opportunity for raising it.

Herndon, 295 U.S. at 444, 55 S. Ct. at 795 (holding that a ruling cannot have been unanticipated if it follows an earlier decision by the same court in a similar case). *See also, Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n. 3, 103 S. Ct. 2296, 2301 n. 3 (1983) ("when the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.") (citations omitted). Under the law of New York, a party may not raise an issue for the first time on reargument in the Court of Appeals; and that court is precluded from considering arguments when they were not raised below. *Cibro Petroleum Products, Inc. v. Chu*, 67 N.Y. 2d 806, 501 N.Y.S. 2d 321, 492 N.E. 2d 394 (1986); *Di Bella v. Di Bella*, 47 N.Y.2d 828, 418 N.Y.S. 2d 577, 392 N.E. 2d 564 (1979).

Petitioner does not argue that the Court of Appeals' decision came as a surprise and that it implicated federal rights in a manner she could not have predicted. Nor could she. The Court of Appeals' decision in this case reads very much like a fuller version of the trial court decision.

Justice Ingraham quoted extensively from the earlier Court of Appeals' decision in *Albala* (App. at 8d-9d). So, too, did Judge Wachtler in the Court of Appeals' decision (App. at 9b-11b, 13b-16b, 19b). Both Justice Ingraham and the Court of Appeals explicitly relied on legislative intent in reaching their decisions (App. at 10d, 11b-12b). Finally, both focused upon policy considerations and on the similarity and distinctions between the negligence and strict products liability theories (App. at 8d-10d, 14b-18b). Because the Court of Appeals decision did not differ in any meaningful way from Justice Ingraham's decision, any federal constitutional issue was presented no later than the decision of the trial court.

In fact, neither decision mentioned either implicitly or explicitly a federally-protected constitutional right. Nor did the dissent in any court address any federal constitutional right. While Judge Hancock in the Court of Appeals disagreed with the majority's application of *Albala* to a strict liability prescription drug case, he based his position on concerns of social and public policy. There is no suggestion of a denial of equal protection.

This issue should have and could have been raised at an early stage of this case. It was not. Therefore, the petition should be denied.

II.

The decision below involves state law and presents no federal questions appropriate for review by this Court.

The decision of the New York Court of Appeals is a classic example of a policy-making, common law court at work defining the state law duties and rights of the citizens subject to its jurisdiction . . . all the citizens, not just some arbitrarily defined sub-group. It does not violate separation of powers, equal

protection, or due process. It does not present a federal question. Accordingly, it is not the kind of matter that should intrude on the time and energies of this Court. This Court has repeatedly declined to address issues of state law. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 50 S. Ct. 451 (1930); *Kryger v. Wilson*, 242 U.S. 171, 375 S. Ct. 34 (1916). See also, *Black v. Cutter Laboratories*, 351 U.S. 292, 76 S. Ct. 824 (1956); *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 70 S. Ct. 876 (1950); *Agins v. Tiburon*, 447 U.S. 255, 260 n. 6, 100 S. Ct. 2138, 2141 n. 6 (1980) ("The appellants' objection to the State Supreme Court's application of state law does not raise a federal question appropriate for review by this Court.")

To avoid this, petitioner appears to argue that, by denying a pre-conception tort cause of action to petitioner, the Court of Appeals created a sub-class and denied the sub-class equal protection and due process of law in violation of the Fourteenth Amendment. First and foremost, the Court of Appeals did not create a sub-class. Instead, the court reaffirmed its general position that New York law does not provide for recovery by any person for a pre-conception tort.

But even if petitioner is correct and the New York Court of Appeals has singled out a "class" of persons to be precluded from judicial relief, state law is presumed to be valid and will be sustained if the classification drawn by the law is rationally related to a legitimate state interest.¹ *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 105 S. Ct. 3249 (1985).

The state has an interest in balancing the concerns of individuals with those of corporations doing business in the state.

1. As petitioner concedes, the New York Court of Appeals' decision should not be subjected to "strict scrutiny" or even to a "heightened standard of review."

The Court of Appeals expressed a particular interest in the pharmaceutical industry. Defining the bounds of liability was one way to strike the balance. In the decision below, Chief Judge Wachtler dwelt at great length on the policy considerations that convinced the court to limit liability in this manner. In essence, the court concluded that "some contact with the substance is essential to a cause of action," thereby creating a prerequisite to recovery in tort (App. at 12b). Establishing such prerequisites is inarguably within the province of the highest court of a state.

The Court of Appeals had established a negligence rule in *Albala*. Several years later, the Legislature passed the Tort Reform Act of 1986 (the "Act"). This lawsuit required the court to consider whether the passage of that legislation and the involvement of diethylstilbestrol would require a different result in strict liability. After reviewing lengthy briefs on both sides, as well as an *amicus curiae* brief in support of petitioner, the court concluded that *Albala* ruled.

Clearly, the Court's reading of the Act was rational. Nothing in the legislation supported special treatment for third generation plaintiffs in DES litigation. As the Court of Appeals stated:

even a remedial statute must be given a meaning consistent with the words chosen by the Legislature — those words define the scope of the remedy that the Legislature deemed appropriate. In our view, the role of the courts is to give effect not only to the remedy, but also to the words that delimit the remedy. (App. at 12b n. 1).

Long before this case reached the New York Court of Appeals, that Court had established the *Albala* rule of law precluding liability for pre-conception torts; but strict liability was not presented in *Albala*. In this case, the Court of Appeals

considered the strict liability question which had been left open. The court concluded after reviewing the legislative history and general policy arguments on both sides that the rule of law established in *Albala* should govern. This approach is clearly within the powers of the highest court of a state and is rationally related to legitimate state interests.

Petitioner also asserts that the Court of Appeals' interpretation of the Act violates her rights because it did not conform to the constitutional separation of powers requirements, *i.e.*, the court encroached on the provinces of the legislature. The Act revived for a limited period of time all otherwise valid DES claims that were barred by the statute of limitations. The Court of Appeals merely ruled that petitioner's claim was not valid. Petitioner somehow raises this to a "separation of powers" argument.

But the Court of Appeals, like any other appellate court, is frequently required to interpret state legislation; and when it does, like any other court, it takes into account the policy concerns expressed in all the legislative history of a statute.

Here, the Court of Appeals explicitly addressed legislative intent in enacting the discovery statute of limitations (§ 214-c of the New York Civil Practice Law and Rules) contained in the Act; found that § 214-c applies to actions "to recover damages for personal injury . . . caused by the latent effects of exposure to any substance . . . ;" quoted the definition of "exposure" contained in § 214-c: "direct or indirect exposure by absorption, contact, ingestion, inhalation or injection;" and concluded that "[i]mplicit in this language is the notion that some contact with the substance is essential to a cause of action, an element lacking here." (App. at 11b-12b). Petitioner may argue that the Court of Appeals' interpretation of the legislation is not what the Legislature intended, but this difference of opinion does not violate the doctrine of separation of powers.

CONCLUSION

Too late, petitioner attempted to establish a favored class that would set her apart from other similarly situated plaintiffs. She failed. She cannot now allege that the decision discriminated against her in an unconstitutional manner. For these reasons, the Petition for a Writ of Certiorari should be denied.

Dated: New York, New York
September 5, 1991

Respectfully submitted,

RUSSEL H. BEATIE, JR.
BROWN & WOOD
Attorney for Respondent
Eli Lilly and Company

CHARNA L. GERSTENHABER
CHARLES J. BIEDERMAN
Of Counsel